

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

~~United States of America; The Klamath Tribes;~~ **PROPOSED ORDER**

Klamath Irrigation District; Klamath Drainage
District; Tulelake Irrigation District; Klamath
Basin Improvement District; Ady District
Improvement Company; Enterprise Irrigation
District; Malin Irrigation District; Midland
District Improvement Co.; Pine Grove Irrigation
District; Pioneer District Improvement
Company; Poe Valley Improvement District;
Shasta View Irrigation District; Sunnyside
Irrigation District; Don Johnston & Son;
Bradley S. Luscombe; Randy Walthall; Inter-
County Title Company; Winema Hunting
Lodge, Inc.; Van Brimmer Ditch Company;
Plevna District Improvement Company; Collins
Products, LLC;

Case No. 193

Claim: 61

Contests: ~~2833~~², 3274, 3459³, ~~3801~~⁴, and
4114⁵

Contestants

vs.

NBCC, LLC¹;
Claimants/Contestants.

HISTORY OF THE CASE

Claimant seeks a water right as a non-Indian successor to a Klamath Indian Allottee, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's "practically

¹ Change of Ownership Filed 4/7/2006 – Roger Nicholson and Richard Nicholson to NBCC, LLC.

² WaterWatch of Oregon, Inc.'s Contest 2833 was dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Don Vincent voluntarily withdrew from Contest 3459 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3459 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3459 on January 15, 2004.

⁴ Contest 3801 was resolved by Stipulation. *See* STIPULATION BETWEEN CLAIMANT AND THE UNITED STATES TO RESOLVE THE UNITED STATES' CONTEST 3801, dated June 30, 2006.

⁵ The Klamath Tribes voluntarily withdrew Contest 4114. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated January 19, 2005.

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irrigable acreage” (“PIA”).⁶ As modified by stipulation, this *Walton* claim is for 1/40th cubic foot per second (cfs) of water per acre and 4.3 acre-feet of water per acre for irrigation of 86.6 acres of land, and incidental livestock watering up to 185 head of cattle. The claimed period of use is April 1 through November 1. The claimed priority date is October 14, 1864.⁷

Richard and Roger Nicholson filed this claim (Claim 61) on February 1, 1991. On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation preliminarily denying this claim.

On May 8, 2000 Claimants filed Contest 3274; WaterWatch of Oregon, Inc. filed Contest 2833; Klamath Irrigation District, Klamath Drainage District, Tulalake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Co., Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Pritchard, Don Vincent, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (hereafter “Klamath Project Water Users” or “KPWU”) filed Contest 3459; the United States filed Contest 3801, and the Klamath Tribes filed Contest 4114. WaterWatch’s contest was dismissed on May 20, 2003. The Tribes withdrew Contest 4114 on January 19, 2005.

The matter was then referred to the Office of Administrative Hearings (OAH). The case was consolidated with a number of other cases involving *Walton* claims into Case 900, for a determination of a common issue of law. After discovery to OWRD on this matter and extensive legal briefing, on March 1, 2004, Administrative Law Judge (ALJ) William D. Young issued his Rulings on Motions for Ruling on Legal Issues in Klamath Adjudication (KBA) Case 900. This Ruling was the subject of a Motion for Reconsideration, and additional briefing. Ultimately ALJ Young withdrew his March 1, 2004 Ruling. Order Withdrawing Rulings on Motions for Ruling on Legal Issues and Allowing Reconsideration, April 15, 2004, KBA Case 900. On April 20, 2004, ALJ Young issued his Order Amending Rulings on Motions for Rulings on Legal Issues in KBA Case 900.⁸ On May 27, 2004, ALJ Young vacated the April 29, 2003 Order Granting Motion to Consolidate. Order Vacating Order to Consolidate, May 27, 2004, KBA Case No. 900. The Order Vacating Order to Consolidate provides that “the cases associated with this consolidated case shall proceed through the contested case process in the same manner as if they

⁶ Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985) (*Walton III*).

⁷ The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 Stat. 707. “The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * *. For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians.” *United States v. Adair*, 478 F Supp 336, 350 (D Or 1979).

⁸ In his Amended Order, ALJ Young concluded that some of the claims filed in the Klamath Adjudication might be precluded because the property had already been subject to a prior adjudication. Because the answer to this question depended on evidence in the individual cases, ALJ Young held that the party seeking preclusion had the burden of going forward and presenting evidence in support of preclusion. No such evidence was presented in this case.

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had not been consolidated, except that the law of the case in each case is set out in the April 20, 2004 Order Amending Rulings On Motions For Ruling On Legal Issues.” *Id.* at 2.

On June 27, 2006, ALJ Maurice L. Russell, II issued an Amended Order on Motion for Ruling on Legal Issues. ALJ Russell concluded in that Order that a *Walton* right could not include any right to water for fish and wildlife purposes.

On July 3, 2006, the United States filed an Unopposed Motion to Admit Stipulation Between Claimant and the United States to Resolve the United States’ Contest 3801 into the Record, with accompanying Stipulation. That motion was granted by order of ALJ Barber issued September 19, 2006.

A hearing was convened by ALJ Barber by telephone on September 28, 2006. Ron Yockim appeared on behalf of Claimant NBCC LLC, successor in interest to the original Claimant Richard and Roger Nicholson. Andy Hitchings appeared on behalf of KPWU. Jesse Ratcliffe appeared for OWRD. No witness testified at the hearing, but evidence was admitted and evidentiary issues discussed.

Claimant filed its Closing Brief on November 17, 2006. KPWU filed its Response memorandum on December 20, 2006. Claimant filed its Reply Brief on January 24, 2007. The record closed on January 24, 2007.

After the record closed, the case was reassigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the September 28, 2006 hearing, prior to preparation of this order.

EVIDENTIARY RULINGS

The following were admitted into the record.

OWRD Exhibit 1 including the Affidavit and Testimony of Teri Hranac.

Affidavit of Roger Nicholson.

Affidavit of Counsel Identifying Exhibits Submitted by Claimant.

Exhibits C1, C3, C5-C26, C28-C30, C32-C38, C40-C45, C48-C79, which were admitted without objection.

Stipulation Between Claimant and the United States to Resolve the United States’ Contest 3801.

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ISSUES⁹

1. Whether there is sufficient documentation to support the elements of a *Walton* claim.
2. Whether the record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed.
3. Whether the right claimed has been previously adjudicated and no issues can be legally re-determined, as the principles of *res judicata* and/or collateral estoppel apply.
4. Whether the Claimants have changed the use of the claimed water from irrigation to fish and wildlife habitat and/or wetlands, but have not complied with Oregon statutory procedures for securing a change of use.
5. Whether the Claimants changed use and application of the water is detrimental to KPWU's prior water rights.
6. Whether the Claimants' use of the claimed water is wasteful for fish and wildlife habitat and/or wetlands.
7. Whether the Klamath River and its tributaries were over-appropriated at the time Claimants began their use of the claimed water for fish and wildlife habitat and/or wetlands.
8. Whether the current use was developed within a reasonable time after the claimed date of appropriation.
9. Whether to the extent water is used for fish, wildlife and/or wetlands, Claimants have abandoned permitted uses.
10. Whether Claimants have abandoned any rights acquired with the lands included in the claim when Claimants purchased it.
11. Whether the Claimants assert a right to store water which interferes with the direct diversion and storage of waters for domestic and irrigation uses in violation of Article III.C of the Klamath River Basin Compact.
12. Whether any rights to use or store water for the purpose claimed is subordinate to domestic and irrigation of rights of KPWU as provided in the Klamath River Basin Compact, Articles II and XIII.

⁹ Only the issues raised by the remaining contestant, KPWU, are included. The issues raised in the other contests have not been listed. The Contests of the United States and the Klamath Tribes have been resolved by withdrawal or stipulation. The Contest issues presented by Claimant related only to issue preclusion, which is no longer a live issue in this case, as no party asserted preclusion within the time allowed under ALJ Young's order.

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13. Whether there is proof to support the water use season claimed.

FINDINGS OF FACT

1) For all allowed water rights in Claim 61, the Rate is 1/40th cfs/acre.¹⁰ The Duty is 4.3 acre-feet of water per acre per year. The Period of Use for irrigation is April 1 through November 1. The Priority date is October 14, 1864. Up to 185 head of cattle are grazed upon the property throughout the year and use 12 gallons per day of water each. (Affidavit of Roger Nicholson at 2.)

2) The land subject to this claim was originally composed 88.8 acres, divided among three lots. Lot 11, composed of 30.3 acres, is located in NE ¼ SW ¼ Section 3 T34S R7.5 E.W.M. Lot 12, composed of 38.7 acres, is located in SE ¼ SW ¼ Section 3 T34S, R7.5E.W.M. Lot 13, composed of 19.8 acres, is located in the SW ¼ SW ¼ Section 3, T34S, R7.5E.W.M. All three lots are irrigated from the Fort Creek Canal, with a diversion point at NW ¼ NW ¼ Section 26, T33S R7.5E.W.M. from Fort Creek, tributary to Wood River. (OWRD Ex. 1 at 7.) Pursuant to the Stipulation between Claimant and the United States to Resolve the United States' Contest 3801, Lot 11 was reduced to 28.1 acres irrigated, reducing to total irrigated acreage to 86.6 acres.

3) On March 15, 1915, the United States allotted to Elmer Hill, Klamath Indian Allottee 1103, property described as lots 11, 12 and 13, located in the SW ¼ Section 3, T34S R7.5 E.W.M., among others, from the land of the Klamath Indian Reservation. (Ex. C49 at 1.) By virtue of inheritance and transfers, by August 13, 1958, the property was held in undivided interests among 10 people, with interests ranging from 3/336ths to 90/336ths. (Ex. C49 at 2.) Between 1958 and 1974, Lloyd Nicholson acquired a number of these undivided interests, but 294/1008ths remained in other ownership. (Ex. C72.) Of these other owners, at least four, Marilyn Mae Mitchell Hall (48/1008), Delora Mitchell Jack (48/1008), Lelia Kirk (9/1008) and Friedman Kirk (9/1008) were Klamath Indians. (Ex. C43.) The interests of these people were sold to Lloyd Nicholson by Deed on Partition by order of the Circuit Court for Klamath County on February 28, 1973. (Ex. C73.)

4) The Fort Creek Canal, part of the Agency Unit (OWRD Ex. 1 at 48), had been in existence long enough in 1919 to require repair and replacement of rotted wooden parts of the works. (*Id.* at 33-38.) A lateral from the Fort Creek Canal passes through the property in question. (*Id.* at 7, 40.)

4) On February 28, 1973, the property passed to the Lloyd Nicholson, the first non-Indian owner. Soon after that date, if not before, the entire parcel was under irrigation, and has been continuously irrigated since that time. (*Id.* at 69.) On April 16, 1986, the Estate of Lloyd

¹⁰ The original claim sought 1/20th cfs per acre (OWRD Ex. 1 at 1) (4.5 cfs divided by 88.8 = 1/20th), but was restricted to 1/40th cfs per acre by the Stipulation between Claimant and the United States. Although a certificate of water right obtained by Lloyd Nicholson with a priority date of October 1, 1973 allowed a duty of five acre-feet per acre (OWRD Ex. 1 at 144.), Claimant agreed to limit the duty to 4.3 acre-feet of water per acre in the Stipulation. KPWU also argued that the rate and duty be limited to this amount. Season of use is as claimed. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

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Nicholson was granted a Certificate of Water Right for the property in question, with a priority date of October 1, 1973, with a rate of 1/50 cfs and a duty of five acre-feet per acre. (*Id.* at 144.)

CONCLUSIONS OF LAW

1. There is sufficient documentation to support the elements of a *Walton* claim.
2. The record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed.
3. The right claimed has not been previously adjudicated.
4. Claimants no longer claim a water right for fish and wildlife.
5. Claimants have not changed the use and application of water.
6. Claimants no longer claim a water right for fish and wildlife.
7. Claimants no longer claim a water right for fish and wildlife.
8. The current use was developed within a reasonable time after the claimed date of appropriation.
9. Claimants no longer claim a water right for fish and wildlife.
10. Claimants have not abandoned any rights acquired with the lands included in the claim when Claimants purchased it.
11. Claimants do not assert a right to store water.
12. Claimants do not assert a right to store water. The relative rights of the use of the water are controlled by the relative priorities of Claimant and KPWU.
13. There is proof to support the water use season claimed.

OPINION

The burden of proof to establish a claim in the Klamath Basin Adjudication is on the claimants. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761 (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

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In his Ruling on United States' Motion for Ruling on Legal Issues in Klamath Case 272, Administrative Law Judge William Young stated the elements of a *Walton* claim as follows:

1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;
2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;
3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

Ruling on United States' Motion for Ruling on Legal Issues, Klamath Adjudication Case 272, August 4, 2003, at 9.

Having reviewed the legal authorities applied by ALJ Young in his ruling, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases.

Originally, this claim included an appropriation for fish and wildlife use. However, in an Order on Motion for Ruling on Legal Issues on June 27, 2006, it was held that fish and wildlife use was not allowable in a *Walton* claim, as that portion of the water right provided in the Klamath treaty was reserved to the Klamath Tribes as a whole. Further, in the Stipulation between Claimant and the United States to resolve the United States' Contest 3801, Claimant disclaimed any fish and wildlife use under this claim. Consequently, those issues raised by KPWU related to fish and wildlife use of water are no longer subject to consideration, and will not be further discussed. Likewise, as this claim does not include a claim to storage of water, the issues related to a storage-right raised by KPWU are not under consideration, and will not be further discussed. Finally, although KPWU argued that the claim is subordinate to its domestic and irrigation use under the Klamath Basin Compact, this argument was not pursued in argument. In any event, given that Claimant has abandoned the claim for fish and wildlife use, and retained only the claim for irrigation and livestock, the relative rights of the parties are controlled by their relative priorities. OAR 690-250-0100(2). The issues remaining relate to the allowability of the claim as a *Walton* right, and its quantification.

The property in question was part of the Klamath Indian Reservation, and allotted to an Indian in 1915. It was subsequently divided by inheritance into numerous undivided interests which included the undivided interests of Indian owners right up to 1973 when Lloyd Nicholson

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purchased the outstanding interests in the property. Prior to this sale, a non-Indian, Lloyd Nicholson, had a fractionalized, undivided ownership in the property, which he shared with the other owners, some of whom were Indians. He and the other owners of the undivided ownership were in effect tenants in common. As such, they had equal right to the enjoyment of the entire property, unless there were specific limitations in the deeds. *United Bank of Denver v. Gardos*, 80 Or App 342, 346-47 (1980). There is no evidence of such limitations. The remaining question is whether Mr. Nicholson's ownership as a tenant in common along with Indians prevents Claimant from establishing *Walton* water rights for this property.

The court in *Walton III* held that the water right is limited to what was developed by the Indian owner or the first non-Indian owner with reasonable diligence, specifically concluding:

The immediate grantee of the original allottee must exercise due diligence to perfect his or her inchoate right to the allottee's ratable share of reserved waters. This interpretation is supported by our references to *Walton II* in subsequent cases. See, e.g., *United States v. Anderson*; *United States v. Adair*.

Walton III, 752 F.2d at 402 (emphasis added) (citations omitted).

In the *Walton* cases, the courts were concerned about preserving the value to the Indian allottees of an undeveloped water right with an early priority date. See, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981), cert den 454 US 1092 (1981) (*Walton II*). In this case, some of the fractionalized interest in the property remained in Indian ownership until Nicholson purchased the property by a Partition Deed. If acquisition of a fractional interest in the property by a non-Indian were enough to convert the water rights of all owners into a *Walton* right, the Indians who were tenants in common with Nicholson would lose the value of their interest because they could not transfer any of their inchoate right to develop the property. As explicitly stated in *Walton II*, 647 F.2d at 51, "The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey."

While the *Walton III* court had no such interest in preserving that value to the non-Indian successors, the purpose of the holding, which is to give the Indian owner the best possible value for his or her land, is not met when Lloyd Nicholson is considered the first non-Indian purchaser when he only held an undivided interest in the property. Granting the Indians' inchoate rights to subsequent owners would in this case increase the value for the various Indians who had an interest in the Allotment at the time the remaining undivided interests were sold to Nicholson. Moreover, the transfer in *Walton II* involved transfers in fee to Walton. *Walton II*, 647 F.2d at 49. Lloyd Nicholson did not acquire such an interest when he acquired a fractionalized, undivided ownership. For these reasons, Claimant has established that Lloyd Nicholson was the first non-Indian purchaser in fee and, to the extent the irrigation rights were not developed prior to that acquisition, his development of the water rights sold to him qualifies for *Walton* water rights.

The testimony of Roger Nicholson, the only percipient witness, shows that the property was subject to irrigation no later than 1973, when it was transferred to the first non-Indian owner

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of the entire parcel. Since the property passed to Lloyd Nicholson, it has been continuously irrigated. The only issue, then, is the quantity to be allowed.

Although the Water Right Certificate issued to the Nicholsons in 1986 (but with a priority date of October 1973) called for a diversion rate of 1/50 cfs of water per acre, the stipulation provides for a rate of 1/40 cfs of water per acre. The certificate does not, of course, limit the rate allowable in these proceedings, although it is evidence of prior use. The Statement of Claim, however, was submitted under penalty of perjury, and specifies a diversion rate of approximately 1/20 cfs per acre. KPWU did not raise any argument respecting either the rate of diversion or the duty, instead advocating that the claim be limited to the amounts agreed upon. Considering the difference between these two rates, the rate agreed upon, 1/40 cfs, is reasonable. Additionally, claimant also agreed to a reduction in the duty for this right from 5 acre-feet of water per acre to 4.3 acre-feet of water per acre.

Based on the evidence presented, I recommend that the Adjudicator allow the claim on the terms specified in the stipulation between Claimant and the United States.

ORDER

I propose that the Adjudicator issue the following order:

Claim 61 is allowed in part as follows:

Season of Use: April 1 through November 1 for irrigation, year round for livestock.
Purpose of Use: Irrigation and incidental livestock watering
Priority Date: October 14, 1864

Diversion Point: NW ¼ NW ¼ Section 26, T33S R7.5E.W.M.

Rate: 2.1 cfs for irrigation, 12 gallons per day per head for up to 185 head of
cattle for livestock watering from November 1 through March 31.

Duty: 372.38 acre-feet of water per year

Acres: 86.6 acres

Source: Fort Creek, tributary to Wood River.

Place of Use: Lot 11 (28.1 acres) in NE ¼ SW ¼

Lot 12 (38.7 acres) in SE ¼ SW ¼

Lot 13 (19.8 acres) in SW ¼ SW ¼

All in Section 3 T34S R7.5 E.W.M.

The remaining portions of the claim should be denied.



Maurice L. Russell, II, Administrative Law Judge
Office of Administrative Hearings

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Dated: May 9, 2007

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order.

Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dwight W. French, Adjudicator
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2007, I mailed a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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